No. 4203

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION ASSURANCE SOCIETY, LTD.,
a Corporation,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

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STATEMENT OF THE CASE

This case involves three alleged errors claimed to have been committed by the District Court in the trial, with the intervention of a jury, of an action at law based on negligence claimed to have been committed by the defendant in error. From a judgment of the District Court, based on the verdict of the jury in favor of the defendant in error, this proceeding is prosecuted.

Plaintiff in error, as assignee of the Spokane, Portland & Seattle Railway Company, sought to recover

from the defendant in error the amount of a payment made to the Spokane, Portland & Seattle Railway Company under a policy of insurance for loss of and damage to five freight cars by fire. Defendant in error denied that the fire complained of by plaintiff in error was caused by or through any act, fault, negligence or want of care on the part of the defendant in error, or any of its agents, servants or employes, and introduced evidence tending to establish these facts. Counsel for plaintiff in error claim, but the defendant in error denies, that the amended complaint upon which the action was tried alleges a cause of action, in favor of the plaintiff in error as assignee, on the contract under which the trains of the defendant in error were operated upon the property of the Spokane, Portland & Seattle Railway Company. Paragraph VII of the complaint, included by plaintiff in error in its statement of the case, does not allege that the plaintiff in error made any claim at or prior to the time it paid the loss to the insured that any fire causing loss or damage insured against was caused by the act or neglect of the defendant in error, or any person. Neither is this elsewhere alleged in the complaint, nor does evidence of the making of such a claim appear in the record. That portion of the statement of the case made by plaintiff in error in the third paragraph on page 4 of appellant's brief, reciting the making of a claim in accordance with the requirements of its policy of insurance, is therefore controverted. The plaintiff in error introduced testimony tending to show that under its policy of insurance it demanded the execution of an assignment by the

Spokane, Portland & Seattle Railway Company and received an assignment from that company.

During the trial plaintiff in error demanded that the defendant in error produce a bill rendered against the defendant in error by the Spokane, Portland & Seattle Railway Company in the sum of $672.03, and a canceled voucher check of the defendant in error in favor of the Spokane, Portland & Seattle Railway Company in the same amount. Upon production of these documents they were offered in evidence by plaintiff in error as an admission of liability. Objection was made by defendant in error to the admissibility of these documents and the objection was sustained. The objection made embraced these points:

> 1st. That by virtue of the contract between the defendant and the Spokane, Portland & Seattle Railway Company, referred to in the complaint, pursuant to which the payment was made, the defendant did not bear the same relationship to the Spokane, Portland & Seattle Railway Company as it did to the plaintiff claiming under its assignment. That payment under the circumstances was not an admission of liability as the Spokane, Portland & Seattle Railway Company was not on a parity with the insurance company. (Trans. p. 37.)
>
> 2nd. That the bill and voucher indicated a compromise settlement. (Trans. p. 38.)
>
> 3rd. That the rights of the Spokane, Portland & Seattle Railway Company under its detour con-

tract were not such as would pass to the plaintiff in error under its assignment. (Trans. p. 48.)

4th. That the transactions between the defendant in error and the Spokane, Portland & Seattle Railway Company under the detour contract were not within the issues of the case because of the terms of the insurance policy and the pleadings. (Trans. pp. 49, 50.)

The trial court sustained the objection on the ground that the Spokane, Portland & Seattle Railway Company and the insurance company did not occupy the same relationship or the same position to the defendant (Trans. p. 51); that the cause of action was for negligence (Trans. pp. 52, 54); that under the pleadings the plaintiff could not recover by reason of the detour agreement between the Spokane, Portland & Seattle Railway Company and the defendant. (Trans. p. 52.)

THE NATURE OF THE ACTION

The first proposition claimed by the plaintiff in error is that the complaint states two causes of action which although admittedly improperly joined, and not separately stated, will each support a judgment in the absence of a direct attack by the defendant thereon for misjoinder. One of these causes of action is admittedly an alleged tort for damage to property and the other is claimed to be an action on contract for damage sustained by the assignee thereof. Since the verdict of the jury in favor of the defendant operates as a conclusive

finding that the defendant in error was not guilty of negligence in any of the particulars charged in the complaint, counsel for plaintiff in error themselves urge the duplicity of the amended complaint in an effort to avoid the legal effect of this finding. Since subrogation is founded on equitable principles, it can seriously be questioned whether such a course can be justified even if such action were permitted under the rules of pleading and practice.

Section 94, Olson's Oregon Laws is as follows:

"Joinder of Causes of Action. The plaintiff may unite several causes of action in the same complaint when they all arise out of—

1. Contract express or implied; or,
2. Injuries, with or without force, to the person; or,
3. Injuries, with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages, for the withholding thereof; or,
6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
7. Claims against a trustee, by virtue of a contract, or by operation of law.

> But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated."

In this connection it will be noticed that the Oregon statute is different from those of many states in that it does not provide for the joinder of causes of action which arise out of the same transaction.

It should also be borne in mind that the amended complaint was filed by the plaintiff in error subsequent to the order of the trial court on a motion of defendant in error directed against plaintiff's complaint, as a part of which motion the defendant moved to have stricken from the complaint, for incompetency, irrelevancy and immateriality, that portion of paragraph III of the complaint setting forth some of the provisions of the detour contract. This part of the motion was denied by the court on the theory that while the complaint was for damage to property caused by negligence, the averment was material and proper to show the circumstances under which it was claimed that the Spokane, Portland and Seattle Railway Company's property was being used by the defendant. Plaintiff in error thereupon reincorporated in its amended complaint (Trans. pp. 7 and 8) the provisions of the detour contract against which the motion had been filed. In following this course the plaintiff in error adopted the construction urged in opposition to the motion to strike and relied upon by the court in overruling the motion, and should not be heard to say that the averments were inserted

for another secret purpose after the trial commenced, and when counsel for plaintiff in error refused to recognize the right of the defendant to move for an election (Trans. p. 53).

This situation first confronted the court when during a discussion of the admissibility of certain testimony, offered by the plaintiff, its counsel (in part) said:

> "It seems to me clear that under that detour agreement the Oregon-Washington Railroad & Navigation Company is bound to the Spokane, Portland & Seattle Railroad Company and therefore to us as the assignee of the Spokane, Portland & Seattle Company for its damage, regardless of the question of negligence." (Trans. p. 46.)

whereupon the court (in part) said:

> "This case, however, as I understand the record and pleadings, is based upon the charge of negligence. It is charged in the complaint that through the negligence and carelessness of the defendant company this property was destroyed, and that by reason of that fact the insurance company was compelled to and did pay a certain sum of money to the assured, and it is that sum it is seeking to recover in this action, and under this complaint it seems to me quite clear the action must proceed on the charge of negligence and not by reason of any agreement or understanding between the two companies concerning the occupation of this line." (Trans. p. 52.)

This conclusion was excepted to by counsel for plaintiff in error who thereupon reiterated his opinion that the amended complaint had a double aspect in that

> "we have set up a cause of action which would be complete in itself regardless of the negligence; we have set up also a cause of action on the negligence." (Trans. p. 54.)

Counsel for plaintiff in error then declared this to be the plaintiff's theory from the beginning and at the time of the argument of the motion to strike.

In overruling this contention, the court said:

> "I looked at the record and everything that was filed at the time that motion was disposed of and it was overruled on the theory that this allegation explains the reason why the Oregon-Washington Railroad & Navigation Company was using that line at that time, but I am unable to construe this complaint in any way other than an action for negligence, because if it had been brought on the assignment claim it would simply have been alleged in straight language that the defendant company by reason of the contract incurred liability, and that that liability had been assigned to the Insurance Company and the question of negligence would not have been alleged in the complaint, so I am constrained to hold that this is based upon negligence as it stands now." (Trans. p. 54.)

An analysis of the amended complaint shows that the necessary allegations of a cause of action for breach

of contract are lacking. It is but elementary to say that an action for the nonpayment of money alleged to be due under a contract must aver such nonpayment. This is usually done by direct allegation, but is sometimes done indirectly by an allegation of indebtedness or the refusal of a demand for payment. 31 Cyc. (Pleading) 103, Notes 7 and 8. Furthermore to constitute a sufficient pleading to support recovery for a breach of contract in which the plaintiff is subject to the performance of certain conditions precedent, allegations of such performance or an excuse or waiver of performance is essential. As stated in 31 Cyc. (Pleading) 107, Sec. 12:

> "Where conditions precedent to the right of action exist, their performance must be alleged by plaintiff in order to state a cause of action, or where there has been no performance and plaintiff intends to rely upon matter excusing performance, such matter must be alleged."

Among its provisions the amended complaint alleges the corporate character of the parties, the ownership of the freight cars, the existence of the insurance policy, the operation by the defendant of a train by virtue of a detour agreement, of which one of the provisions related to loss, damage, injury or death

> "which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring." (Trans. p. 8, lines 2-5.)

and the payment of certain costs and expenses in clearing wrecks and repairs

> "in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned." (Trans. p. 8, lines 25-28.)

The complaint then states (paragraph V) that the defendant was negligent in certain particulars and that

> "while said train of defendant was so being run, and *by reason of such negligence*" (Trans. p. 9, last two lines.)

the freight cars were set on fire. In paragraph VI it is alleged that plaintiff paid $3,056.49 to the Spokane, Portland & Seattle Railway Company under its insurance policy on account of the loss and damage resulting

> "by the fire so caused and set" (Trans. p. 10, line 7.)

The last paragraph of the complaint pleads the condition of its insurance policy

> "that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment." (Trans. p. 11.)

Thereafter the only allegations are those concerning the payment by the plaintiff to the Spokane, Portland & Seattle Railway Company and the assignment of the latter to the plaintiff and the ownership by the plaintiff of the assigned claims.

Considering this complaint, it will be noted in the first place that there is no allegation in the complaint that any damage was incurred or sustained by reason of trains being detoured or detour movements, but on the contrary it is expressly stated that the damage complained of occurred

> "while said train of defendant was so being run, and by reason of such negligence." (Trans. 9, last two lines.)

Secondly, it will be noted that there is no allegation of performance either by the plaintiff as assignee or the Spokane, Portland & Seattle Railway Company of the obligations to be borne by either under the detour contract.

Third, there is absolutely no allegation of nonpayment or non-performance by the defendant under the detour contract or any indirect statement of indebtedness, demand and refusal or other equivalent terms from which the breach by the defendant could be inferred. For aught that appears in the complaint the defendant may have fully settled with the Spokane, Portland & Seattle Railway Company all the obligations of the defendant under the detour contract.

Finally, it should be noted that the right of assignment accorded to the plaintiff by the insurance policy is conditioned on a certain claim to be made by the Insurance Company, and there is no allegation by the plaintiff that such claim was made.

As to the first of these defects, no extended explanation is necessary. A certain result may transpire *while* a train is being run and yet may not have occurred *by reason of* such operation. In fact, the plaintiff in error in paragraph IV of its amended complaint alleges that at the time of the fire the weather was hot and dry and the vegetation and structures and objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company were dry and inflammable. The defendant was not responsible for either of these conditions, but the defendant's knowledge thereof was alleged in support of its cause of action in tort for the alleged destruction of the property by negligence. Certainly it does not seem reasonable that plaintiff in error can fairly contend that the allegation of the complaint that fire was set

> "by reason of such negligence"

(as such items of negligence were thereafter more particularly specified) is an allegation under the contract that the loss occurred or was sustained

> "by reason of such trains being detoured or by reason of such trains being delayed in such detouring" or
>
> "by reason of detour movements covered by this agreement" (in which) "the engines, trains or cars of the Foreign Company are concerned."

That this cannot be done under the decisions of the Supreme Court of Oregon clearly appears from the case of Miller vs. Hirschberg, 27 Oregon 522, 535-6, 40 Pac. 506, wherein it was said:

> "The contention for the defendant is that, as the court found the allegation of fraud in the complaint to be untrue, the remaining facts as found by it only show a breach of an implied contract of sale, and, therefore, under the well settled rule that a recovery cannot be had on a complaint which in terms alleges a cause of action sounding in tort by proof of the breach of a contract express or implied, the judgment must be reversed. If the premises upon which this argument is based are conceded, the conclusion inevitably follows, for the rule referred to is too well settled to be questioned. After a careful consideration of the able reargument of this case, and a re-examination of the record, we concur with counsel that the complaint sounds in tort, and will not support an action on a contract, and the holding to the contrary in the former opinion is erroneous. The plaintiff must recover in tort, or not at all. He has so laid his cause of action, and must abide the result."

This case was lately cited with approval by the same court in Gary Coast Agency, Inc. vs. Lawrey, 101 Oregon 623, 627; 201 Pac. 214, wherein the court speaking by Burnett, C. J., discusses Miller vs. Hirschberg, *supra,* as follows:

"The doctrine of that case is, that one cannot allege a tort and prove a mere breach of contract. The question of misjoinder was not discussed. The other precedents cited under that point are substantially to the same effect. Practically, the defendant relies upon both fraud and breach of warranty. It may well be said that a plaintiff cannot join tort and contract in the same action."

To the same effect, see Savage vs. Salem Mills Co., 48 Oregon 1, 10-11; 85 Pac. 69, as follows:

"Mr. Chief Justice Bean delivered the opinion. The defendant contends that the complaint states a cause of action for breach of the contract under which the wheat was delivered by plaintiff and his assignors and received by it, and also for a conversion of such wheat; hence the demurrer to the complaint, or the motion made at the trial to require the plaintiff to elect upon which cause of action he would proceed, should have been sustained. But as we read the complaint, it states but one cause of action, and that on contract. It sets out in detail the terms of the agreement under which the wheat was delivered and received, and alleges a breach thereof. There is no charge that the wheat was wrongfully or unlawfully converted by the defendant to its own use, but, on the contrary, the allegation is that under the contract the defendant was entitled to use the wheat as part of its consumable stock and to sell or manufacture it into flour at its pleasure, discharging its liability to the plaintiff and his assignors by either deliver-

> ing to them other wheat of the same grade and quality, or by paying the market price of such wheat when demanded. A demand and refusal were necessary under the contract in order to fix the defendant's liability, for it was not required to pay for the wheat delivered, either in kind or in money, until requested to do so."

The rule is tersely stated in 31 Cyc. (Pleading) 104, as follows:

> "some duty or obligation must be shown to rest upon the party sought to be charged, a neglect or breach *of which* has resulted in the injury complained of."

As to the second defect, an examination of the amended complaint will fail to disclose any allegations of the terms or substance of the detour contract, except for the meager reference thereof quoted in paragraph III. (Trans. pp. 7 and 8.) Neither was the contract introduced in evidence nor any testimony introduced to show its terms or conditions, nor the consideration paid by the Spokane, Portland & Seattle Railway Company to procure its execution by the defendant. In quoting some of the provisions, counsel for the plaintiff in error must have had knowledge of the other terms, and if at the time of filing of the amended complaint it was the intention of counsel to commingle a cause of action for negligence with a cause of action on contract for breach of the detour agreement, it seems incomprehensible that attorneys so experienced as counsel for plaintiff in error should have neglected the necessary allegations and proof of these matters.

In the case of Johnson vs. Homestead-Iron Dyke Mines Co., 98 Ore. 318, 327, 193 Pac. 1036, error was assigned predicated on the action of the lower court in overruling defendant's motion requiring the plaintiff to elect upon which of his alleged causes of action he would rely. In considering the sufficiency of the pleading, the Supreme Court said:

> "The court committed no error in overruling defendant's demurrer. The plaintiff's rights grew out of the alleged breaching of the contract by defendant. The plaintiff pleads the making of the contract, its terms, the consideration, performance by plaintiff, breach by defendant, and damages." (Citing several cases.)

The amended complaint in this action obviously fails to include these essentials. The statutory requirements devolving upon plaintiff are stated in Section 88, Olson's Oregon Laws, as follows:

> "Performance of Condition Precedent. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. (L. 1862; D. Sec. 86; H. Sec. 87; B. & C. Sec. 88)."

As pointed out above, a third essential to a good cause of action on contract has been omitted from the

complaint by reason of the failure of the plaintiff to allege non-payment of the sum claimed, or an allegation of indebtedness or other averment from which it could be ascertained with certainty that the defendant had broken its covenant.

In Pacific Bridge Co. vs. Oregon Hassam Co., 67 Oregon 576, 580, 134 Pac. 1184, the court said:

> "The complaint herein does not aver that in consequence of the breach of the agreement the plaintiff sustained any damages, but charges that by reason of the facts alleged in the initiatory pleading the defendant became indebted to the plaintiff, etc. The defect in the complaint in this particular renders it insufficient to sustain a judgment for damages, though a witness for plaintiff testified in respect to the loss claimed to have been occasioned by the breach of the contract: Bohall vs. Diller, 41 Cal. 532."

In fact, the bill and voucher sought to be introduced in evidence by plaintiff, and rejected by the court, upon which the first specification of error is predicated (Trans. pp. 70-73) would refute any claim of plaintiff in error that the defendant was in default under the detour contract.

Paragraph VII of the complaint alleges the conditions precedent devolving upon the insurance company under its policy of insurance with the Spokane, Portland & Seattle Railway Company as to the claims and payments to be made by the insurance company before

it was entitled to demand and receive an assignment. Subsequently there is an allegation that the payment was made, but nowhere is there an allegation (either generally in the form prescribed by Section 88, Olson's Oregon Laws, supra, or specifically by averment) that the plaintiff had preferred a

> "claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation." (Complaint, Paragraph VII, Trans. p. 11.)

This is the final objection made above and it is sufficient in itself to sustain the ruling of the trial court that the amended complaint stated only a cause of action based on negligence.

In Fire Ass'n of Philadelphia vs. Schellenger, 94 Atl. 615, the insurance company issued one of its policies of insurance upon the property of Schellenger, the defendant, containing a cause identical with that pleaded by plaintiff in error herein. A loss occurred and was settled with the assured. Later Schellenger sued a railroad company, claiming that the latter's negligence had caused the loss. Schellenger received a verdict in excess of the amount paid by the insurance company, which was compromised by the Railroad Company for a sum likewise in excess of the insurance company's payment. Schellenger executed to the railroad company a general release of all liability for loss or damage occasioned by the fire. The insurance company, claiming the right of subrogation, sued Schellenger for reimbursement of the moneys paid. In the lower court re-

covery was permitted which was reversed on appeal in a decision as follows:

> "Whatever may be the extent of the right of subrogation residing in an indemnitor, under such a state of facts as the present case exhibits, in the absence of any agreement upon the subject between the indemnitor and the indemnitee, we see no reason for denying the power of the parties to curtail, or even to destroy it by mutual consent, if they see fit to do so. An agreement to that end runs counter to no provision of the written law, and is not opposed to any public policy of the state. The right of subrogation is a mere personal one, conferred solely for the benefit of individuals; and a right of this character may always be waived by the party in whom it resides. Quick vs. Corlies, 39 N. J. Law, 11. The rights of the parties to this litigation, therefore, must depend upon the meaning of the provision of the policy which deals with the matter of subrogation.
>
> It is plain from a reading of this part of the contract that the parties to it intended that the right of the insurer, in case it paid the loss, should not be an absolute, but a conditional one; the condition being that the insurer should 'claim that the fire was caused by the act or neglect' of some third person. We think it equally clear that the agreement contemplates that such claim should be made by the insurer to the insured at or before the time when it paid the loss. This appears from the fact that by its terms the right to subrogation, if it

comes into existence at all, becomes complete when the payment is made. The language used is 'this company shall on payment of the loss be subrogated,' etc., 'and such right shall be assigned to this company by the insured on receiving such payment.'

There is no suggestion, either in complainant's bill or in the proofs submitted by it at the hearing, that it made any claim to the defendant that the fire against which it had indemnified him had been caused by the act or neglect either of the Atlantic City Railroad Company or of any other person, until many months after it had paid the moneys due under its policy. On the contrary, the fact appears that it made no such claim prior to the filing of its bill in this cause. Its failure to assert such claim at or before the time when the payment was made was a failure to comply with the condition upon which its right to subrogation depended, and terminated the existence of that right, leaving the defendant free to so deal with the person responsible for the fire, with relation to a settlement of any claim against such person, as he might see fit, without any liability to be called to account by the complainant for any of the proceeds of such settlement."

Likewise in Home Insurance Co. vs. Hartshorn, 91 Southern 1, a storage company filed a bill of interpleader against the insurance company and Hartshorn to determine which was entitled to certain moneys recovered in a judgment for the destruction of cotton by

fire. Hartshorn was the owner of the cotton upon which the insurance company had issued its policy. After the fire a settlement was made between the insurer and insured, whereupon the owner sued the storage company for the value of the cotton burned. One of the provisions of the insurance policy was identical with that involved here. The insurance company claimed to be entitled by subrogation to participate in the proceeds of the judgment to the extent of its payment. The insured interposed a demurrer to the insurance company's cross-bill which was sustained. In affirming this judgment, the court said:

> "The right of the appellant to be subrogated to the appellee's claim for damages for the destruction of the cotton covered by the insurance policy being expressly provided for in the policy, its right thereto must be measured by and depends solely on the terms of the clause of the policy dealing therewith and hereinbefore set forth.
>
> One of the requirements of this clause of the policy is that:
>
> 'If this company shall claim that the fire was caused by the act or neglect of any person * * * this company shall, on payment of the loss, be subrogated,' etc., the meaning of which necessarily is that the claim must be made to the insured at or before the time of the payment to the insured of the loss under the policy, and the reason for the requirement probably is that the insured may have an opportunity of taking into consideration when settling with the insurer the fact that the damages

to be recovered from the person by whose fault the property was destroyed will go to him or to the insurer as the case may be. If such a claim can be made at any time, then any provision therefor in the policy would be useless, for the mere filing of a suit by the insurer against the person whose act or neglect caused the fire would be a sufficient claim that the fire was so caused. * * *

The cross-bill should, but does not, allege that such a claim was made to the insured at or before the time when the loss was paid."

Of a similar nature are the cases of Sun Insurance Office of London vs. Heiderer, 99 Pac. 39, and Traders' Insurance Company vs. Race, 31 N. E. 392. In each of these cases the owner of property, subject to the lien of a mortgage, procured a policy of insurance to which was attached a mortgage clause protecting the mortgagee, to the extent of his interest, against invalidity of the policy through the fault of the insured, and further providing that if any loss should occur under the policy it should be paid to the mortgagee and if the insurance company should claim that no liability existed as to the mortgagor or owner, the insurance company should, upon such payment, be subrogated to the extent of such payment to the rights of the mortgagee under the mortgage. In each of the cases the insurance company contended that its bare statement that it claimed that there was no liability on the part of the company to the insured, without alleging any facts which, under the terms of the policy, would

exempt it therefrom, was sufficient to entitle it to subrogation of the securities. In denying this contention, the court in the Sun Insurance Company case said:

> "before he (the owner) can be deprived of such benefit, it must be shown that he has violated the provisions of the policy in some particular that renders it void as to him. His rights do not depend upon the mere claim of the insured. The appellant, therefore, to avail itself of the right to be subrogated to the rights of the mortgagee, instead of applying the payment of the loss toward the satisfaction of the mortgage, must allege and prove a state of facts which, under the contract of insurance, would entitle it to exemption from liability to the mortgagor." (Citing cases.) Sun Insurance Office of London vs. Heiderer, 99 Pac. 31, 41.

In the Traders' Insurance Company case the same rule is announced in different language.

Unless all the necessary averments of a cause of action arising on contract appear in the amended complaint, it cannot be said that there exists any duplicity in the pleading to which a motion for an election of remedies or a demurrer for misjoinder of causes of action could properly have been addressed or sustained. The conclusion is therefore inevitable that the sole cause of action stated in the amended complaint is for damage to property by negligence resulting from the alleged tortious acts of the defendant. In such a complaint the allegations setting forth a portion of the detour contract

could have no materiality or relevancy except on the hypothesis assigned by the trial court that it explained the reason why the defendant was upon the property of the Spokane, Portland & Seattle Railway Company. In adopting this construction in overruling defendant's motion to strike these allegations from the complaint the court reconciled the allegations of the complaint with the statutory requirements for good pleading and construed the pleading most favorably to the defendant. In this the plaintiff in error acquiesced and exhibited its full accord by the introduction of testimony designed only to support its allegations of negligence until it sought to have admitted in evidence as an admission of liability (Trans. p. 34) a bill and voucher check produced from the defendant's files upon plaintiff's demand (Trans. p. 33). When, in the succeeding discussion, it appeared that the documents tendered could not fairly be considered as an admission of liability because the Spokane, Portland & Seattle Railway Company and the plaintiff Insurance Company did not occupy the same relationship to the defendant company—as conclusively appeared from the documents themselves and the brief excerpt of the detour contract alleged in the complaint—an inducement arose to ascribe a double aspect to the complaint which is not borne out by careful inspection nor sanctioned by orderly practice or the statutes or decisions of Oregon.

The cases of Harvey vs. Southern Pacific Company, 46 Oregon 505, 80 Pac. 1061, and Hoag vs. Washington-Oregon Corporation, 75 Oregon 588, 144 Pac. 574, 147 Pac. 756, relied upon by plaintiff in error are not

inconsistent with the contention made by us in any respect. In the Harvey case the court said:

> "The right of action is essentially the same, but the relief is different." (p. 512.)

and in the Hoag case:

> "But in the case at bar the measure of damages is the same in either case; the difference between the common-law liability and that arising under the statute being that additional duties on the part of the employer to the employee are added by the statute to those existing at common law. The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source." (p. 602.)

In endeavoring to reconcile the Harvey and Hoag cases to its views, the plaintiff in error in its brief states:

> "The measure of recovery was precisely the same on either theory, namely, the loss inflicted by defendant's act." (Appellant's Brief, p. 33.)

We dispute this statement, as we will presently show, for if the detour contract can be construed to have required the defendant to pay a loss for which it would not have been liable in tort for negligence committed by it, the contract to this extent would be a contract of indemnity under which the plaintiff in error would be entitled, if at all, only to contribution to the

extent of the defendant's ratable proportion of the entire loss sustained. But eliminating, for the moment this feature of the case, it is quite plain that the decisions of the Oregon Supreme Court in the above cases are based in large measure, if not entirely, upon the principle that even though the allegations of the complaint might support proof not only of a common law liability, but also of statutory liability, yet the obligations of the defendant embraced both of these duties. In other words, the court could affirmatively hold on appeal that the defendant in these cases could not have denied its duty to comply with the statutory provisions or to fulfill its common law duties. No such conclusion could have been reached by the mere incorporation into the complaint of a recitation of one of the provisions of a contract—especially in the absence of a plea by the plaintiff of full performance on its part of the conditions of the contract or breach of the contract by the defendant—for the obvious reason that without proper pleading or proof no one can state what the obligations of the defendant were under the contract. In short, "the whole obligation" under the common law and under the detour contract cannot now be determined because all the detour contract and the acts of the parties thereunder were not before the court. Consequently, it would have been error for the court to have construed the action except as one based on negligence and one supporting a judgment only if founded on proof of negligence.

THE ASSIGNMENT TO PLAINTIFF

In order to claim the advantage of the detour contract, plaintiff pleads and has introduced in testimony the assignment from the Spokane, Portland & Seattle Railway Company. Under such assignment it is contended that plaintiff is entitled to claim all the benefits of the detour contract. Assuming that the plaintiff made the claim which entitled it to demand the assignment, and assuming that the Spokane, Portland & Seattle Railway Company could, without notice to or the assent of the defendant, have executed to the plaintiff an assignment of the detour contract, these questions arise: To what extent, if any, do the provisions of the insurance policy limit or permit the assignment? Does the assignment introduced in evidence, as thus limited or permitted, include a total or partial assignment of the rights of the Spokane, Portland & Seattle Railway Company under the detour contract?

Section 6457, Olson's Oregon Laws, in part provides:

> "That from and after the first day of September, 1911, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy, or renewal of any fire policy on property in this state other than as shall conform to the following conditions, which conditions shall be contained upon page two of such policy of insurance, and which shall form a portion of the contract be-

tween such insurer and insured, and which shall read as follows: (then follows the conditions referred to, which are those known as the New York Standard, among which are the following):

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * or if the hazard be increased by any means within the control or knowledge of the insured; * * * or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants, without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured, or otherwise; * * *"

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon."

"If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured *for the loss resulting therefrom,* and *such right* shall be assigned to this company by insured on receiving such payment." (Italics ours.)

"Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured, and wherever the word 'loss' occurs, it shall be deemed the equivalent of 'loss or damage.' "

Similar provisions apply in the State of Washington pursuant to the terms of Section 7152, Remington's Compiled Statutes of Washington, 1922, which reads in part as follows:

"on and after January 1, 1912, no fire insurance company shall issue any fire insurance policy covering on property or interest therein in this state other than on form known as the New York Standard as now or may be hereafter constituted, except as follows: (Enumerating exceptions not material here.)"

From the above it will be observed that the claim to be made by the insurance company is that the fire was caused by the act or neglect of any person or corporation, and if so made the right of recovery by the insured for the loss resulting therefrom—that is, for

the loss resulting from the fire caused by the act or neglect—is the right to be assigned. We believe that as used in the standard policy, which is the form used by the planitiff in error in this case, that the phrase "by the act or neglect" necessarily implied some improper or wrongful act or neglect in the performance of some obligation prescribed by common law or statute. The plaintiff in error contends that the word "act" standing alone is sufficient to include anything which might be claimed by the insurance company. This construction is certainly too broad if we give effect to the requirement that the act or neglect must cause the fire.

As stated by the Supreme Court of Oregon in the case of Milwaukee Mechanics' Ins. Co. vs. Ramsey, 76 Ore. 571, 149, Pac. 542, L. R. A. 1916 A 556, 558:

> "Again, if insured property is burned by the *tortious act* of one not a party to the policy, the insurance company, paying the loss to anyone to whom, by the terms of the policy, payment must be made, is subrogated pro tanto to the chose in action the payee has *against the tort feasor.* The reason in such a case is that, but for the *wrong* resulting in destruction of the property, no liability would have accrued against the insurance company; but, as it has neither privity of estate or contract with the incendiary, and is nevertheless compelled by the policy to pay *for the result of the tort,* its reimbursement is accomplished by subrogation."

The same court in American Central Insurance Co. vs. Weller, 212 Pac. 803, had under consideration a

claim by an insurance company, technically supported by the terms of its policy and the transactions of the parties which it sought to enforce against the defendant, Weller, concerning whom the court said:

> "he (Weller) is not accused of any *wrongful act* (p. 804)" and
>
> "It is unquestionably the general rule that on payment of a loss the insurer acquires the right to be subrogated pro tanto to any right of action which the insured may have against any third person *whose wrongful act or neglect* caused the loss. 14 R. C. L., p. 1404, Sec. 568, note.
>
> The facts in the case at hand do not bring the case within the rules above stated, or the authorities cited by counsel for plaintiff." (p. 805.)

In view of the foregoing, and especially because of the provisions of Section 7147, Remington's Compiled Statutes of Washington for 1922, punishing as a misdemeanor any company or person knowingly violating any provision of the insurance code for which no penalty is provided, the case of Fort vs. Globe & Rutgers Fire Insurance Co., 169 N. Y. S. 229, affirmed 173 N. Y. S. 595. Appeal dismissed, 125 N. E. 918, is extremely interesting as the expression of the New York courts upon the effect of statutes providing for the standard form of insurance policy later adopted by the states of Oregon and Washington. In that case the plaintiffs were the owners of real property in New York—some for a life interest, and the others for the remainder. The holder of the life estate, who was charged under

a will with the duty of insuring the property, procured a policy from the defendant. Although he explained the nature of the title to the agent of the defendant through mutual mistake the policy was issued solely in the name of the owner of the life estate. On expiration a new policy was issued in the same terms. While the latter policy was in force, the City of Albany commenced a condemnation action to secure the insured property, which resulted in proceedings, shortly before the fire, confirming the sum to be paid to the owners as compensation. The fire occurred before payment of the compensation, at which time title would actually pass to the city. Proof of loss was rejected by the insurance company because the property was not insured in the name of the true owner, and also because under the condemnation proceedings the insurers were divested of title and the policy made void for want of an insurable interest by the insured. An action was commenced to reform the policy and collect the loss. In answer the insurance company contended that the policy was void, and also that the insurer was subrogated to the rights of the insured against the city, to the extent of that part of the condemnation award, which the defendant may be obliged to pay under the policy.

The Supreme Court permitted the reformation, determined the policy valid, allowed recovery, and denied subrogation on equitable grounds.

On review, the Appellate Division affirmed the judgment but assigned to the denial of subrogation these grounds:

"We concur in his (Mr. Justice Rudd) opinion, except that we think the argument that the plaintiffs have impaired the defendant's right of subrogation should be answered differently. Section 121 of the Insurance Law, at the time this policy was issued (Chapter 181 of Laws of 1913), required a standard fire insurance policy containing definite agreements and conditions and provided that:

'No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or delivered therewith, except as follows (the exceptions not being here material):'

"A violation of this statute was made a misdemeanor. Penal Law (Consol. Laws c. 40) Sec. 1193.

"The policy in this case, complying, of course, with the requirements of the statute, provides for subrogation if it is claimed that the fire was caused by the act or neglect of any person or corporation, and provides for subrogation in no other case. The right of subrogation may rest on equitable principles and not necessarily in contract. But when, as here, the Legislature specifically declares in effect that such right may be made the subject of contract in one particular instance, and in no other, and makes it criminal to contract for the right of subrogation in other respects, it is reasonably clear that the legislative purpose was that such right of subrogation should not be exercised, save in the

specific instance. It would have been a crime for the defendant to insert in this policy a provision giving it the right which it now asserts as a defense to this action (Citing cases)."

Section 7147, Remington's Compiled Statutes of Washington, 1922, above referred to, reads as follows:

> "General Penalties. Any company or person who knowingly violates any provision of this act for which no penalty is provided, shall be deemed guilty of a misdemeanor and shall be punished as provided by law."

Among the foregoing provisions of the standard policy it will be observed that changes of occupants of the insured property when made "without increase of hazard" do not affect the right of recovery by the insured in event of loss. On the other hand, if the assured permitted a change of occupants of the insured property, with increase of hazard, the policy became absolutely void and settlement for any loss thereafter occurring might rightfully be refused by the insurance company to the insured.

In this case the plaintiff pleads in its amended complaint that the defendant was running its train over the tracks of the Spokane, Portland & Seattle Railway Company (the insured), under an agreement between the defendant and the insured. To the extent that this occupancy of the property of the assured was accomplished without increase of hazard, it was permitted by the express terms of the policy and the verdict of the

jury in this case in favor of the defendant, on the issues of negligence submitted to it, and the evidence offered by the insurance company of its payment of the loss necessarily establish the fact that the defendant in occupying the right of way of the Spokane, Portland & Seattle Railway Company for the movement of its trains did so without increase of hazard. Otherwise, why did not the insurance company treat the insurance policy as void by the voluntary act of the insured?

The answer is apparent. The occupancy of the property of the Spokane, Portland & Seattle Railway Company by other railroads for railway purposes was contemplated and the risks therefrom compensated for when the policy was issued. We believe that counsel for plaintiff in error would hardly contend that whenever fire damaged a house occupied by a tenant, an insurance company paying the loss could hold the tenant responsible therefor without proof of negligence by the simple expedient of demanding an assignment from the insured. And yet in this case, though one of the special conditions of the policy read as follows:

> "It is a condition of this policy that fuel oil and coal only are used (except in Cars Nos. 1101 and 1102 which are gasoline, electric motor cars) for fuel in locomotives on the line of this road. The use of wood for kindling is permitted."

the plaintiff in error nevertheless endeavored to convince the jury that the defendant was guilty of negligence under the testimony introduced in support of the allegation in Paragraph V of its amended com-

plaint, wherein it was charged that

> "defendant carelessly and negligently hauled said train with its engine or engines burning coal."

The transaction is in many respects similar to that in Milwaukee Mechanics' Ins. Co. vs. Ramsey, supra, where the insurance company having issued its policy on property belonging to Ramsey, with a clause making the loss payable to a mortgagee bank, later sought, under a claim of subrogation from the bank, to recover its loss from the owner. The Supreme Court, in affirming a decree sustaining a demurrer to the complaint and dismissing the suit, pointed out that if Ramsey's acts under the policy constituted a breach of that contract the insurance company was not bound to pay anything so that its disbursement was voluntary and not recoverable. So in this case, if the Spokane, Portland & Seattle Railway Company permitted the occupancy of its property with an increase of hazard rendering the policy void, it will not avail the insurance company claiming under an assignment derived from the Spokane, Portland & Seattle Railway Company to urge that it is entitled to reimbursement by reason of the hazards resulting from such occupancy.

In this connection, it is pertinent to consider the Article of Subrogation executed by the Spokane, Portland & Seattle Railway Company (Trans. pp. 27, 28). In the first paragraph recitation is made of the policy of insurance and in the second the occurrence of a fire stated to have been caused by sparks from a locomotive of the defendant by which the insured property was

damaged or destroyed, whereupon an assignment is made of all rights and things in action against persons, including the defendant

> "who may be liable, or hereafter adjudged liable for burning or destruction of said property."

Finally the plaintiff is authorized to sue, compromise and settle in the name of the Spokane, Portland & Seattle Railway Company, or otherwise, and is subrogated to all the rights of the Spokane, Portland & Seattle Railway Company "in the premises to the amount so paid."

If the Spokane, Portland & Seattle Railway Company had intended by this document to have assigned to the plaintiff its rights under the detour agreement, would not execution of the detour agreement have been recited with the same particularity as was the insurance policy? And does not this omission and the express statement of "rights in the premises" limit the effect of the document to the insurance policy? That this is the proper construction is borne out by the fact that there is no proof that notice of the assignment was given to the defendant and by the fact that the bill of the Spokane, Portland & Seattle Railway Company was its separate bill (and not a joint bill with the insurance company) in which the defendant was given credit for the salvage and insurance. This construction is also substantiated by the filing of the complaint in this cause for the full sum of $3,056.49, whereas if the insurance company had then intended to rely upon an assignment of the detour contract as a covenant by the

railroad of indemnity it would have sued only in a lesser sum for the contribution recognized in the policy. The detour contract as now construed by plaintiff in error is purely a contract of indemnity or insurance—for it is claimed that thereunder the defendant is liable without proof of negligence—and in such a contingency the theory of contribution would be applicable.

However, to entitle the plaintiff to claim the right of contribution, it should, before settlement of the loss with the insured, have sought an agreement with the defendant as to the proper adjustment and apportionment of the loss. This it did not do. The rule is thus stated in 26 Corpus Juris "Fire Insurance" (p. 455):

> "Pro rata liability. Where each policy stipulates to pay the proportion of the loss which the amount insured by it bears to the whole amount of insurance on the property, the contracts are independent, and each insurer binds itself to pay its own proportion without regard to what may be paid by others and no right of contribution exists in favor of either of them; unless they enter into an independent agreement among themselves in respect to adjusting and apportioning the loss, and through mistake the adjustment and apportionment is so made that one or more of them are compelled to bear a larger proportion than they are legally bound to do, in which case they are entitled to recover the excess from the other insurers. But if of several policies one only contains the clause providing for a ratable payment, and the others not

> containing such clause pay more than their ratable share, they will be entitled to a proportionate contribution from the underwriters on the policy containing this clause."

Since, therefore, the assignment was not designed, and under the terms of the policy could not operate, to transfer to the plaintiff the rights of the Spokane, Portland & Seattle Railway Company under the detour agreement, the plaintiff could not maintain an action thereon, nor derive any rights thereunder against the defendant. In this connection see Wolf vs. American Traction Society, 58 N. E. 31, 51 L. R. A. 241, and Berry vs. Gillis, 17 N. H. 9, 43 Amer. Dec. 584.

THE DETOUR AGREEMENT

The argument of plaintiff in error does not decisively show which terms of the detour agreement narrated in the amended complaint are relied upon to establish a duty or obligation of the defendant which would entitle the plaintiff to recovery without proof of negligence. Certainly, there is nothing in the provision that

> "The Home Company shall not be held liable for or on account of any loss, damage, or delay of the trains, engines, cars or other property of any kind of either company."

which in any way implies that the Foreign Company would consider itself liable for any of the loss, damage or delay mentioned. The succeeding terms relating to

assumption of risk merely imply that the Foreign Company would not seek to evade its ordinary responsibility for its own negligent acts on the plea that the Home Company was primarily responsible. The full purport of the provision regarding assumption of risk is made plain from a consideration of the case of St. Louis, Iron Mountain & Southern Railway Co. vs. Chappel, 102 S. W. 893, 10 L. R. A. (N. S.) 1075, the syllabus of which is as follows:

> "A railroad company which permits a logging road to use its track with the engines and cars is liable for the destruction of neighboring property by sparks thrown by such engines."

A later case on the same subject is Bryant vs. Sampson Lumber Company, 93 S. E. 926, L. R. A. 1918 A 938, the syllabus of which is as follows:

> "A standard-built railroad operating under a quasi public franchise cannot without express legislative sanction contract or lease its road to an independent contractor so as to relieve itself from liability for fires negligently set out by the operation of the road. For other cases, see Railroads, I and II d, 7, in Dig. 1-52 N. S."

See also Quigley vs. Toledo Railways & Light Company, L. R. A. 1918 E. 249 and note.

From an examination of these cases one finds that in the past a railroad company permitting another to use its right of way has been subjected to loss through the breach of some common law duty by the licensee.

This unusual situation arises from the public nature of the business ordinarily transacted by a railroad company. To protect itself against the application of this principle and to compel the Foreign Company to respond to causes of action predicated upon the negligence of the Foreign Company, the terms of the detour agreement were designed. However, the detour agreement was not devised, nor has it been enforced, to require the Foreign Company to settle the torts of the Home Company which were committed by the Home Company while the Foreign Company was operating over the same line. The fact of negligence of the Home Company or Foreign Company is not eliminated by the detour agreement, but on the contrary is made the controlling factor.

The only remaining portion of the detour agreement alleged in the complaint is that portion providing that the Foreign Company

> "will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of wrecks, and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned." (Trans. p. 8).

The use of the term "cost and expenses" as distinguished from "loss" and "damage" previously mentioned is significant in view of the action of the Spokane, Portland and Seattle Railway Company giving to the defendant proper credit for the proceeds from

salvage and insurance. The Spokane, Portland and Seattle Railway Company quite evidently construed the provision to entitle the defendant, as licensee, to the proceeds of the insurance. The payment of such an account, even if made in accordance with the terms of the contract, does not support the claim that the defendant admitted responsibility for any tortious act or any obligation not stated in the bill.

The plaintiff in error is endeavoring to treat an agreement for the payment of a debt as synonymous with an agreement to assume responsibility for damages to property whether occasioned with or without negligence. This is not sound in logic nor in accordance with equitable principles, nor the express language of the insurance policy. The recognition of such a principle eliminates the requirement of proof that the fire was caused by a wrongful act and would entitle the insurance company to recoup itself from any tenant of or licensee using the insured property who was, at the time of the article of subrogation, a debtor of the insured. In this manner the insurance company, by a subversion of equitable doctrines could reimburse itself for fire losses, which, for a premium, it had agreed to bear, and which transpired through no person's wrongful act. Such cannot be the law.

THE REJECTION OF DOCUMENTS

The plaintiff's offer of testimony embraced not only the bill rendered by the Spokane, Portland & Seattle Railway Company, but also the memoranda on it and

the draft or voucher check of the defendant. (Trans. p. 33.)

It is well settled that the bill of the Spokane, Portland & Seattle Railway Company is hearsay and inadmissible.

Mr. Justice Burnett, delivering the opinion of the Oregon Supreme Court in the case of Caro vs. Wollenberg, 83 Oregon 311, 323, 163 Pac. 94, announced the rule in Oregon in the following language:

> "In some instances there appear in the record what purport to be receipted bills from Carroll for some expenditures, but it is well settled that receipts of third parties constitute hearsay and are not to be received in evidence: Ellison vs. Albright, 41 Neb. 93 (59 N. W. 703, 29 L. R. A. 737). The doctrine governing that matter is that the receipt of one not occupying any official relation to the transaction is, in the first place, a declaration not under the sanction of an oath, and second, that the person making it is not presented for cross-examination by the adverse party. Receipts required by law, as for public taxes and the like constitute a manifest exception to the rule. Under these principles, therefore, the defendant failed to prove his charges for plumbing performed by the deceased Carroll."

This rule was again followed by the Supreme Court of Oregon in 1922 in the case of Backus vs. West, et al,

104 Oregon 129, 147, 205 Pac. 533, in which it was held that:

> "It has been held in Caro vs. Wollenberg, 83 Or. 311, 323 (163 Pac. 94), that the receipts of third parties for money payments are hearsay and consequently not admissible. They are the unsworn declarations of the party executing the receipts, the signer is not subject to cross-examination and they have no binding force whatever between strangers to the instrument."

This is also stated to be the rule in 22 Corpus Juris "Evidence" (pp. 207, 209) and in the case of Ellison vs. Albright, 29 L. R. A. 737, with note. See also Hornsby vs. Jensen, 78 S. E. 267.

As to the admissibility of the voucher, the cases stated by plaintiff in error recognize that no relaxation from the hearsay rule is justified unless the party to whom the payment is made stands in the same position to the party making the payment as does the person offering the instrument. That such a parity in fact exists must appear to the court before submission of the documents as evidence to the jury. As stated in Michigan Mutual Home Insurance Company vs. Pere Marquette Ry. Co., 160 N. W. 599, 601, cited by plaintiff in error:

> "whether the testimony is admissible in any particular case is a preliminary question to be decided by the trial court, and is analogous to the determination of the admissibility of confessions in criminal cases."

This court then considered the testimony which there showed that the assured had rendered a bill to the defendant for the entire loss, including that covered by the insurance, upon which the defendant made a payment on account, without any evidence indicating any intention to compromise the entire claim or deny its liability. On these facts this case is not in point here.

The remaining case on this point relied upon by plaintiff in error is the case of Weiss vs. Kohlhagen, 58 Oregon 144, which also states the requirement that the settlement with others, to be admissible, is contingent upon the showing that the payees were "in the same position as plaintiff" (Appellant's Brief p. 39). This was conceded by defendant to be the rule upon the trial in the lower court, as examination of the record will disclose. (Trans. p. 37.) We did contend, and still urge, that the position of the defendant and the Spokane, Portland & Seattle Railway Company, by virtue of the contractual relationship disclosed by the plaintiff's allegations of the detour contract, was entirely dissimilar from our relationship to the plaintiff claiming as an assignee under the insurance policy. It would be unprofitable to discuss at extended length other cases in which, of course, the facts were different, but in the case of Puget Sound Electric Railway vs. Van Pelt, 168 Fed. 208, this court found that there was no error committed by the trial court in excluding, from the trial of a case for personal injuries, evidence of a settlement made by the plaintiff with an accident insurance company under a policy covering the same occurrence. So in Moore vs. Stetson Machine Works, 188 Pac. (Wash.)

769, the court reversed a judgment for plaintiff, for damages sustained in an automobile collision, on account of the error of the lower court in admitting testimony showing that the defendant's agent had voluntarily repaired the plaintiff's automobile and had requested from plaintiff the execution of a release.

In the footnote to the quotation from 22 Corpus Juris (p. 320) set forth by plaintiff in error on p. 40 of appellant's brief, numerous cases are cited for the proposition that

> "where several persons are injured in the same accident a compromise with one cannot be shown in an action by the other."

In no event could the voucher check be considered as an admission that under the detour agreement the defendant was liable without proof of negligence, for, as to this, it is stated in 22 Corpus Juris "Evidence" Sec. 325 (p. 298) that statements or admissions relating to a question of law are not admissible in evidence, for the reason that a party should not be affected by statements which may be attributed to a misapprehension of his legal right.

All the evidence was rightfully excluded.

THE REFUSAL OF REQUESTED INSTRUCTION No. 4

Plaintiff in error claims that it was entitled to the submission of this instruction if its construction of the detour agreement entitled it to recovery without proof of negligence upon the part of the defendant. We desire to point out, however, that there are ambiguities and material errors in the requested instruction, aside from the point above mentioned, which justified its refusal. In the first place the requested instruction refers to "this train" (Trans. p. 74) which is ambiguous and uncertain in that the plaintiff in error in its amended complaint only specified

> "an east bound freight train of the defendant which passed said point at about noon of said day" (Trans. p. 7).

This allegation was denied except that it was conceded that about noon of that day one of the defendant's east bound freight trains with engines Numbered 2113 and 2128, controlled by the pilot engineer and the train dispatcher of the Spokane, Portland & Seattle Railway Company, was operated near McLaughlin, Washington (Trans. pp. 14, 15). There is testimony in the record as to the movement of other trains on the same day and at the same place. The instruction should have been definite as to the train, and if designed to summarize the pleadings should have conformed to the defendant's answer.

The instruction further states that the defendant "assumed liability to the Spokane, Portland and Seattle Railway Company" (Trans. p. 74) while the provision of the detour contract is merely that the Foreign Company will hold the Home Company harmless from and against all liability. The instruction further assumes conclusively that the plaintiff was the assignee of the Spokane, Portland and Seattle Railway Company, which was a point in issue.

For the foregoing errors, the requested instruction should have been refused as well as for the direction therein given the jury to return a verdict against the defendant without proof of negligence committed by it.

There being no error in the proceedings in this case, the judgment of the Distrit Court should be affirmed.

Respectfully submitted,

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